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An Analysis of Assault and Attempts to Assault

It has often been said that an "attempt to assault" is a logical absurdity. After describing the different concepts of assault and how they have developed, Professor Perkins analyzes the current meaning of attempt to assault. He concludes that there are four situations in which an attempt to assault has been made a punishable offense. Professor Perkins also discusses and supports the related notion that every battery includes an assault.

Rollin M. Perkins*

An oft-repeated comment is that there is no such offense known to the law as an attempt to commit an assault.¹ The problems and implications involved in this comment are entitled to more extensive examination than they seem to have been accorded.

I. DIFFERENT CONCEPTS OF ASSAULT

In the early law the word "assault" represented an entirely different concept in criminal law than it did in the law of torts. As an offense it was an attempt to commit a battery; as a basis for a civil action for damages it was an intentional act wrongfully placing another in apprehension of receiving an immediate battery.² The distinction has frequently passed unnoticed because a misdeed involving either usually involves both. If, with the intention of hitting X, D wrongfully threw a stone that X barely managed to dodge, then D would have been guilty of a criminal assault because he had attempted to commit a battery, and he would also have been liable in a civil action of trespass for assault because he had wrongfully placed X in apprehension of physical harm.

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1. See, e.g., *Green v. State*, 82 Ga. App. 402, 405, 61 S.E.2d 291, 293 (1950); *White v. State*, 22 Tex. 608, 609 (1858); *Brown v. State*, 7 Tex. Crim. 569 (1880).

2. For a discussion of this development, see PERKINS, CRIMINAL LAW 86-93 (1957). Apparently if we go back far enough, we come to the time when the civil action of trespass for assault was "an action brought by the person aggrieved by the actor's attempt to commit a battery upon him." RESTATEMENT, TORTS § 24, comment c at 54 (1934).

Some commentators have been so imbued with the tort theory of assault that they have had difficulty in realizing that in the early law a criminal assault was an attempt to commit a battery and that only. In the words of one notewriter, the "offense which the great majority of the courts are calling and punishing as a criminal assault is in effect an attempted battery, which is, and probably should be punished as, a distinct and separate criminal offense."³ Research had disclosed to the writer what the courts were doing, but seemed to leave the impression that they were getting out of line. The present writer has been unable to locate any case in the English reports that contains a common law indictment charging "an attempt to commit a battery"; the indictment typically charged the defendant with an "assault."⁴

The fact that the original criminal assault was an attempt to commit a battery and nothing else is the reason behind the oft-quoted comment mentioned at the outset that an attempt to commit an assault is unknown to the law. In the words of the Georgia court, "as an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it This is simply absurd."⁵ Except for variations in wording, this has been the common explanation.⁶ The same fact accounts for certain other statements such as that an assault is an inchoate battery;⁷ that every battery includes an assault;⁸ that battery is a consum-

3. Note, *Is a Criminal Assault a Separate Substantive Crime or Is It an Attempted Battery?*, 33 KY. L.J. 189, 196 (1945).

4. *But see* 1 BISHOP, CRIMINAL LAW § 764 (8th ed. 1892) ("there may be an indictable attempt to commit a battery"). The only case he cites in support of the statement is *United States v. Lyles*, 26 Fed. Cas. 1024 (No. 15646) (C.C.D.C. 1834), which was an indictment for solicitation to commit a battery, which he says is a "form of attempt." He gives a cross reference to his own volume 2, § 62, which deals with assault. Hence, it is obvious he was not referring to an indictment worded in terms of an attempt to commit a battery.

5. *Wilson v. State*, 53 Ga. 205, 206 (1874).

6. "As an assault is an attempt to commit a battery, there can be no attempt to commit an assault." 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 72, at 154 (Anderson ed. 1957). "Thus embracery is an attempt to bribe a juror, an assault an attempt to commit a battery, and there can be no attempt to commit these offenses." 1 BURDICK, CRIME § 135, at 176 (1946). "There can be no such offense as an 'attempt to attempt' a crime. Since a simple assault is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, or robbery, an attempt to commit an assault, whether simple or aggravated is not a crime." CLARK & MARSHALL, CRIMES 218 (6th ed. 1958). *Accord*, 2 BISHOP, CRIMINAL LAW § 62 (8th ed. 1892); HOCHHEIMER, CRIMES AND CRIMINAL PROCEDURE § 266 (2d ed. 1904).

7. *Luther v. State*, 177 Ind. 619, 624, 98 N.E. 640, 641 (1912); *People v. Lilley*, 43 Mich. 521, 525, 5 N.W. 982, 985 (1880); UNDERHILL, CRIMINAL EVIDENCE § 684 (5th ed. 1957).

8. *Hall v. State*, 309 P.2d 1096 (Okla. Crim. 1957); 2 BISHOP, CRIMI-

mated assault;⁹ and that one "may obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm."¹⁰ It explains also why one who has committed a battery is frequently prosecuted for assault and battery.¹¹ This does not mean that two offenses are charged in separate counts of the accusatory pleading, but that one offense is charged in one count under the name of "assault and battery."¹² In substance, at least in the original usage, it was a charge of a successful attempt to commit a battery. Not infrequently, however, the charge is merely an assault although the attack obviously resulted in a battery.¹³ Often a criminal assault has been defined in terms of an attempt to commit a battery,¹⁴ and the need for an intent to inflict such harm has been emphasized.¹⁵ "The offer or attempt must be intentional," said the Mississippi court, "for if, notwithstanding appear-

NAL LAW § 33 (8th ed. 1892); 1 EAST, PLEAS OF THE CROWN 406 (1803); 1 HAWKINS, PLEAS OF THE CROWN 263 (6th ed. 1788). This is not true of assault as a tort because apprehension on the part of the other is essential. See PROSSER, TORTS § 10, at 37 (2d ed. 1955).

9. *Anderson v. Crawford*, 265 Fed. 504 (8th Cir. 1920); *People v. Heise*, 217 Cal. 671, 673, 20 P.2d 317, 318 (1933); *People v. Duchon*, 165 Cal. App. 2d 690, 332 P.2d 373 (Dist. Ct. App. 1958); *May v. Commonwealth*, 285 S.W.2d 160 (Ky. 1955); *State v. Maier*, 13 N.J. 235, 99 A.2d 21 (1953). See also *Lawson v. State*, 30 Ala. 14 (1857).

10. *Chapman v. State*, 78 Ala. 463, 465 (1885); *accord*, *People v. Pape*, 66 Cal. 366, 5 Pac. 621 (1885); *People v. Lilley*, 43 Mich. 521, 5 N.W. 982 (1880); *State v. Cornwell*, 97 N.H. 446, 91 A.2d 456 (1952); *State v. Adamo*, 9 N.J. Super. 7, 74 A.2d 341 (App. Div. 1950); *State v. Wilson*, 218 Ore. 575, 346 P.2d 115 (1959). This would not be recognized as an assault in the law of torts. PROSSER, TORTS § 10, at 35 (2d ed. 1955); RESTATEMENT, TORTS § 22 (1934).

11. *Hill v. State*, 63 Ga. 578 (1879); *Shaw v. State*, 239 Ind. 248, 156 N.E.2d 381 (1959); *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932); *State v. Monroe*, 121 N.C. 677, 28 S.E. 547 (1897); *Saunders v. State*, 208 Tenn. 347, 345 S.W.2d 899 (1961). In one prosecution for assault and battery the evidence indicated "a rather severe beating." *Clark v. State*, 370 P.2d 46, 50 (Okla. Crim. 1962).

12. See *People v. Young*, 12 App. Div. 2d 262, 263, 210 N.Y.S.2d 358, 360 (1961), where the court said that "assault and battery is an ancient crime cognizable at the common law."

13. *People v. Moore*, 50 Hun 356, 3 N.Y. Supp. 159 (Sup. Ct. 1888); *State v. Hemphill*, 162 N.C. 632, 78 S.E. 167 (1913).

14. *McKay v. State*, 44 Tex. 43, 48 (1875); see *Guarro v. United States*, 237 F.2d 578, 580 (D.C. Cir. 1956); *Lane v. State*, 85 Ala. 11, 14, 4 So. 730, 732 (1888); *State v. Lasby*, 174 A.2d 323, 324 (Del. Super. Ct. 1961); *State v. Rand*, 156 Me. 81, 82, 161 A.2d 852, 853 (1960); *Yantz v. Warden*, 210 Md. 343, 351, 123 A.2d 601, 606 (1956).

15. *Burke v. United States*, 282 F.2d 763 (9th Cir. 1960); *State v. Crow*, 23 N.C. 375 (1841); see *People v. Carmen*, 36 Cal. 2d 768, 228 P.2d 281 (1951); *Thomas v. State*, 99 Ga. 38, 26 S.E. 748 (1896); *State v. Crowl*, 135 Mont. 98, 337 P.2d 367 (1959); *People v. Lay*, 254 App. Div. 372, 5 N.Y.S.2d 325 (1938); *Johnson v. State*, 43 Tex. 576 (1875); *Riley v. State*, 92 Tex. Crim. 237, 243 S.W. 467 (1922).

ances to the contrary, it can be collected that there is not a present purpose to do an injury, it is not an assault."¹⁶

II. THE CHANGING CONCEPT

The tort concept of assault seems to be substantially the same as it was in the early law,¹⁷ but during the years two changes have tended to creep into the concept of criminal assault, both apparently making their appearance by inadvertence rather than by design. The two have moved in different directions, and while many jurisdictions have greatly enlarged the scope of criminal assault, a few have restricted its application.

A. CRIMINAL ASSAULT BASED UPON A TORT THEORY

While few jurisdictions have abandoned the original basis for establishing a criminal assault in the absence of statute,¹⁸ there has been a tendency in many to add the tort theory as an additional ground. Where the tort theory has been added, a simple criminal assault "is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery."¹⁹ This position, it may be added, has now been taken by a majority of the jurisdictions.²⁰

A notewriter considered this addition to be ground for complaint,²¹ and there is something to be said for this position. In each jurisdiction where this was done without the aid of statute, the first case adopting the new theory naturally resulted in a conviction for what had not been defined as a crime at the time the

16. *Smith v. State*, 39 Miss. 521, 525 (1860); *accord*, *State v. Sears*, 86 Mo. 169, 174 (1885); *cf.* *State v. Davis*, 23 N.C. 125, 127 (1840).

17. PROSSER, *TORTS* § 10, at 34-35 (2d ed. 1955); *RESTATEMENT, TORTS* §§ 21, 22, 24 (1934). A Texas case held that a civil assault was determined by the definition of criminal assault. *Texas Bus Lines v. Anderson*, 233 S.W.2d 961 (Tex. Civ. App. 1950), criticized in 30 *TEXAS L. REV.* 120 (1951).

18. Sometimes, however, an attempt to commit a battery, the original basis for criminal assault, seems to have been held not to constitute an assault. In one case a directed verdict of not guilty was affirmed because the intended victim did not see the weapon and knew nothing of the threat until afterwards. *State v. Barry*, 45 Mont. 598, 124 Pac. 775 (1912). In some cases the tort theory has been emphasized without holding that an attempt to commit a battery would not of itself constitute a criminal assault. *Ladner v. United States*, 358 U.S. 169 (1958); *Commonwealth v. White*, 110 Mass. 407 (1872). Some statutory definitions of criminal assault also have abandoned the original basis. *ILL. REV. STAT. ch. 38, § 12-1* (1961).

19. *People v. Wood*, 10 App. Div. 2d 231, 236, 199 N.Y.S.2d 342, 347 (1960).

20. *MODEL PENAL CODE* § 201.10, comment (Tent. Draft No. 9, 1959).

21. Note, *The Misuse of the Tort Definition of Assault in a Criminal Action*, 11 *ROCKY MT. L. REV.* 104 (1939).

"assault" was committed. This did not violate the constitutional bar against *ex post facto* laws since that provision is directed to the legislative body,²² but it clearly violated the underlying principle that no one should be punished for doing what had not been defined as a crime at the time it was done.²³ Had the change been made by legislative enactment, the courts would not have permitted it to have retroactive effect. The explanation for this apparent anomaly is that the change did not come about as a result of a conscious effort to enlarge the scope of a criminal offense, but as a consequence of the confusion caused by the use of the same word to represent two different concepts.²⁴ A threat of an immediate battery resulting in apprehension, even when intended only as a bluff, is so likely to result in a breach of the peace that it should be a punishable offense;²⁵ hence there need be no regret that it is an offense in most jurisdictions even if we might wish that the enlargement of criminal assault had been made prospectively by legislative enactment rather than retroactively by "judicial legislation."

Where criminal assault has been given this dual scope, a definition in terms of "an attempt or offer" to commit a battery is assumed to represent both grounds. The word "offer" signifies a threat that places the other in reasonable apprehension of receiving an immediate battery.²⁶ It would be a mistake, however, to assume that the word carried any such significance when it first appeared in the definition of this offense. In one of its meanings, "offer" is

22. "No . . . *ex post facto* Law shall be passed." U.S. CONST. art. I, § 9. "No State shall . . . pass any . . . *ex post facto* Law" U.S. CONST. art. I, § 10.

23. For a scholarly discussion, see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27-69 (2d ed. 1960).

24. See, e.g., *State v. Hazen*, 160 Kan. 733, 740, 165 P.2d 234, 239 (1946); *People v. Wood*, 10 App. Div. 2d 231, 236, 199 N.Y.S.2d 342, 347 (1960); *State v. Allen*, 245 N.C. 185, 189, 95 S.E.2d 526, 529 (1956); *Dunbar v. State*, 75 Okla. Crim. 275, 131 P.2d 116 (1942); *State v. Sims*, 3 Strobl. 137 (S.C. 1848); *State v. Wiley*, 52 S.D. 110, 216 N.W. 866 (1927).

25. If "a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." *Regina v. St. George*, 9 Car. & P. 483, 493, 173 Eng. Rep. 921, 926 (Cent. Crim. Ct. 1840). See also *Richels v. State*, 33 Tenn. (1 Sneed) 606 (1854); HOCHHEIMER, *CRIMES AND CRIMINAL PROCEDURE* § 254 (2d ed. 1904).

26. Thus, in holding an intent to strike unnecessary, the Kansas court held that an assault is committed by "a wilful offer with force or violence to do corporal injury to another . . . if the circumstances are such that the person threatened reasonably believes the injury will be done." *State v. Hazen*, 160 Kan. 733, 740, 165 P.2d 234, 239 (1946). The fact that the reference is not to an "apparent offer" but to a "wilful offer" is significant. See also *Richels v. State*, 33 Tenn. (1 Sneed) 606 (1854).

a synonym of "attempt." Duplicity of expression was no stranger in the early law, and when the phrase was first used in this definition, it was as if it had been worded "an attempt or effort." This significance is manifest when the court says "the offer or attempt must be intentional" because if there "is not a present purpose to do an injury, it is not an assault."²⁷ In fact, a real strain is placed upon the word "offer" when it is given the meaning of a mere pretense of impending harm, and the assumption that the word has this meaning when used in the definition of criminal assault is merely part of the explanation of how the tort theory was inadvertently added to the offense. Such connotation is employed only by those who seek to bring the two-fold aspect of criminal assault within its original definition, while writers,²⁸ courts,²⁹ and legislators³⁰ interested in emphasizing the point make use of a different form of expression, such as that an assault is either "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery."³¹

B. THE REQUIREMENT OF PRESENT ABILITY

The original concept of criminal assault developed at an earlier day than the doctrine of criminal attempt in general, and crystallized on a much narrower basis in the sense of a greater degree of proximity.³² In the words of the Ohio Supreme Court:

27. *Smith v. State*, 39 Miss. 521, 525 (1860); see *Johnson v. State*, 35 Ala. 363 (1860); *State v. Blackwell*, 9 Ala. 79 (1846); *State v. Sears*, 86 Mo. 169 (1885).

28. MODEL PENAL CODE § 201.10, comment (Tent. Draft No. 9, 1959); Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U.L. REV. 119, 132 (1946).

29. *People v. Wood*, 10 App. Div. 2d 231, 199 N.Y.S.2d 342 (1960).

30. LA. REV. STAT. § 14:36 (1951).

31. *Ibid.* See also STEPHEN, DIGEST OF THE CRIMINAL LAW 237 (9th ed. 1950):

An assault is

(a) an attempt unlawfully to apply the least actual force to the person of another directly or indirectly,

(b) the act of using a gesture towards another giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid,

(c) the act of depriving another of his liberty.

32. See PERKINS, CRIMINAL LAW 495 (1957). In *State v. Davis*, 23 N.C. 125, 127 (1840), an early North Carolina court said:

It is difficult in practice, to draw the precise line which separates violence menaced, from violence begun to be executed—for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any act, which, if not stopped—or diverted—will be followed by personal injury—the execution of the purpose is then begun—the battery is attempted.

The distinction may be thus defined: An assault is an act done toward the commission of a battery; it must precede the battery, but it does so immediately. The next movement would, at least to all appearance, complete the battery . . . [A]n act constituting an attempt to commit a felony may be more remote³³

The emphasis here was upon the very strict interpretation of "proximity" in the law of assault. In making the same point, but with the emphasis upon the more liberal interpretation in the law of criminal attempt in general, it has been said: "This is a clear recognition of the principle that an attempt, or the overt act which is the initial stage thereof, does not require a physical act in the way of an assault or advance upon the person of the intended victim."³⁴ Therefore, since one may be guilty of an attempt to commit murder or rape, for example, without coming close enough to his intended victim to commit an assault,³⁵ it follows that the attempt is a lesser included offense in a prosecution for an aggravated assault of that nature.³⁶

At times this difference in the requirement of proximity has found expression in statutes that provide for conviction of an attempt to commit murder where the attempt is by "any means not constituting the crime of assault with intent to murder,"³⁷ or for conviction of an attempt to commit rape where the attempt was "not such as to bring it within the definition of an assault with intent to commit rape"³⁸ There has been some relaxation in the degree of proximity required,³⁹ but in the early days there was no assault until the assailant came within apparent reach of his intended victim.⁴⁰ This fact is helpful in understanding some of the early references to assault.

33. *Fox v. State*, 34 Ohio St. 377, 380 (1878), quoted in part in *State v. Green*, 84 Ohio App. 298, 303, 82 N.E.2d 105, 107 (1948). See also *State v. Hetzel*, 159 Ohio St. 350, 112 N.E.2d 369 (1953).

34. *State v. Mortensen*, 95 Utah 541, 550, 83 P.2d 261, 265 (1938) (Hanson, J., dissenting). See also *Valley v. State*, 203 Tenn. 80, 309 S.W.2d 374 (1957).

35. *People v. Welsh*, 7 Cal. 2d 209, 60 P.2d 124 (1936); *Ramsey v. State*, 204 Ind. 212, 183 N.E. 648 (1932).

36. *People v. Rupp*, 41 Cal. 2d 371, 260 P.2d 1 (1953); *People v. Miller*, 17 Cal. Rptr. 535 (Dist. Ct. App. 1961). But see *State v. Hewitt*, 158 N.C. 627, 74 S.E. 356 (1912), in which the difference in the requirement of proximity was overlooked. See also 21 MINN. L. REV. 213 (1937).

37. MICH. COMP. LAWS § 750.91 (1948).

38. TEX. PEN. CODE art. 1190 (1948).

39. Where D advanced upon X with a stick in a threatening manner, he was held guilty of assault even though he was stopped by Y before he was within striking distance of X. *State v. Vannoy*, 65 N.C. 532 (1871); accord, *People v. Bird*, 60 Cal. 7 (1881); *People v. Hunter*, 71 Cal. App. 315, 235 Pac. 67 (Dist. Ct. App. 1925).

40. *Lane v. State*, 85 Ala. 11, 4 So. 730 (1887); *State v. Straub*, 190

Apart from legal usage, "assault" means an attack, and that was its meaning when it first appeared in the law. The phrase "premeditated assault" is older than "malice aforethought,"⁴¹ and even the civil action of trespass for assault was originally based upon an attack.⁴² Coke and Hale seem to have been too exclusively interested in felonies to bother with a definition of assault, although each used the term as meaning an attack.⁴³ Hawkins said that "an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with, or without, a weapon; or presenting a gun at him, at such a distance to which the gun will carry"⁴⁴ Blackstone's definition was "an attempt or offer to beat another."⁴⁵ East indicated that:

[A]n assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it.⁴⁶

Three comments are necessary. First, neither Hawkins nor Blackstone mentioned "present ability," and East did not include this phrase in his definition, but only used it by way of illustration. Second, East's reference to "present ability" was obviously meant to emphasize the requirement of proximity rather than any notion

Iowa 800, 180 N.W. 869 (1921); *People v. Lilley*, 43 Mich. 521, 5 N.W. 982 (1880); *Fox v. State*, 34 Ohio St. 377 (1878).

41. 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 468 (2d ed. 1899). This meaning has tended to persist in the criminal law except where the tort theory has been added. *E.g.*, *Offences Against the Person Act*, 1861, 24 & 25 Vict., c. 100, §§ 37 ("Whoever shall assault and strike or wound . . ."), 47 ("Whoever shall be convicted upon an indictment of any assault occasioning actual bodily harm . . .").

42. It was "an action brought by the person aggrieved by the actor's attempt to commit a battery upon him." *RESTATEMENT, TORTS* § 24, comment c (1934).

43. COKE, *INSTITUTES*, pt. 3, at 54 (1648); 1 HALE, *PLEAS OF THE CROWN* 425 (1736).

44. 1 HAWKINS, *PLEAS OF THE CROWN* 263 (Leach 6th ed. 1788).

45. 3 BLACKSTONE, *COMMENTARIES* *120. This is in the third book dealing with "private wrongs." In the fourth book dealing with "public wrongs" he says of assault: "I have nothing further to add to what has already been observed in the preceding book" 4 *id.* at *216. There is no indication of awareness of any difference between assault as a crime and assault as a tort, but he seems to be thinking in terms of the former. Of assault he says: "This also is an inchoate violence . . . and therefore, though no actual suffering is proved, yet the party injured may have redress . . ." 3 *id.* at *120.

46. 1 EAST, *PLEAS OF THE CROWN* 406 (1803).

of actual present ability, for otherwise his illustration would have been in terms of "pointing a *loaded* weapon." Third, the inadvertent addition of the tort theory to the concept of criminal assault may have had its inception in the statement by East.⁴⁷ The statement that he was about to comment on "common assaults and batteries" for which there are "civil" remedies, which immediately preceded his definition of a criminal assault, indicates that he was thinking of assault as a crime and as a tort, with no appreciation of the difference between the two. That he was not thinking of assault exclusively in terms of the apprehension of the other party is shown by the words immediately following his definition of assault—"where the injury is actually inflicted, it amounts to a battery, (which includes an assault;) . . ."⁴⁸

One English case that did not involve assault took the position that there could be no attempt to commit a crime if perpetration was impossible under the circumstances,⁴⁹ but this position was later repudiated in England⁵⁰ and has not been followed in this country.⁵¹ Although there is no legally recognized attempt to commit a crime unless the perpetration appeared to be possible to the one who is claimed to have made the attempt, actual present possibility is not required.⁵² In this connection, the prevailing view quite soundly holds that apparent possibility is sufficient for an assault,⁵³ as where the offense was committed with an unloaded

47. *Ibid.* Possibly the inadvertent addition should be attributed to Blackstone. See 3 BLACKSTONE, COMMENTARIES *120.

48. 1 EAST, *op. cit. supra* note 46, at 406.

49. *Regina v. Collins*, 9 Cox Crim. Cas. 497 (Ct. Crim. App. 1864) (no attempt to commit larceny by reaching into an empty pocket).

50. *Regina v. Ring*, 17 Cox Crim. Cas. 491 (Crown Cas. Res. 1892).

51. *State v. Wilson*, 30 Conn. 500 (1862); *Commonwealth v. Williams*, 312 Mass. 553, 45 N.E.2d 740 (1942); *Commonwealth v. McDonald*, 59 Mass. (5 Pick.) 365 (1850); *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890).

52. WILLIAMS, CRIMINAL LAW 635 (2d ed. 1961).

53. *De Graff v. State*, 34 Ala. App. 137, 37 So. 2d 130 (1948); *State v. Paxson*, 29 Del. (6 Boyce) 249, 99 Atl. 46 (1916); *State v. Hazen*, 160 Kan. 733, 165 P.2d 234 (1946); *State v. Adamo*, 9 N.J. Super. 7, 74 A.2d 341 (App. Div. 1950); *State v. McIver*, 231 N.C. 313, 56 S.E.2d 604 (1949); *Fox v. State*, 34 Ohio St. 377 (1878); *State v. Linville*, 127 Ore. 565, 273 Pac. 338 (1928); *State v. Wiley*, 52 S.D. 110, 216 N.W. 866 (1927); *State v. Deso*, 110 Vt. 1, 1 A.2d 710 (1938); *State v. Shaffer*, 120 Wash. 345, 207 Pac. 229 (1922); *Regina v. St. George*, 9 Car. & P. 483, 493, 173 Eng. Rep. 921, 926 (Cent. Crim. Ct. 1840). In *State v. Swails*, 8 Ind. 524 (1857), it was held that there was no assault without both intent and present ability, but this was expressly repudiated in *Kunkle v. State*, 32 Ind. 220 (1869). Present ability is now required by statute in Indiana. IND. ANN. STAT. § 10-402 (1956).

weapon.⁵⁴ It is true that most of the cases cited are from jurisdictions in which criminal assault has been enlarged by the addition of the tort theory, and obviously an unloaded weapon could cause reasonable apprehension in the mind of one who believed it was loaded. It should be noted, however, that although where the dual basis is recognized there would be no inconsistency in holding apparent possibility sufficient for conviction on the tort theory while actual possibility is needed to establish an attempt to commit a battery, the cases rarely give any such intimation.⁵⁵ The logical position is that one may be guilty of an assault by attempting to shoot another with a gun that one mistakenly believes to be loaded or by threatening with a gun that the other does not know is unloaded. The indications are that this position will be upheld.⁵⁶

It is interesting to note that while in most states the criminal law concept of assault has been enlarged by the addition of the tort theory, this has been almost entirely by judicial action.⁵⁷ But while several states have narrowed the concept of criminal as-

54. *Price v. United States*, 156 Fed. 950 (9th Cir. 1907); *McNamara v. People*, 24 Colo. 61, 48 Pac. 541 (1897); *Crumbley v. State*, 61 Ga. 582 (1878); *State v. Shepard*, 10 Iowa 126 (1859); *State v. Coyle*, 103 Kan. 750, 175 Pac. 971 (1918); *Commonwealth v. White*, 110 Mass. 407 (1872); *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904); *People v. Wood*, 10 App. Div. 2d 231, 199 N.Y.S.2d 342 (1960); *People v. Morehouse*, 6 N.Y. Supp. 763 (Sup. Ct. 1889); *State v. Atkinson*, 141 N.C. 734, 53 S.E. 228 (1906); *Clark v. State*, 106 Pac. 803 (Okla. Crim. App. 1910); *State v. Smith*, 21 Tenn. (2 Humph.) 457 (1842). At one time the Texas statute provided that "pointing an unloaded gun . . . cannot constitute an assault." *Mackay v. State*, 44 Tex. 43, 45 (1875). Under the present Texas statute, an assault is an attempt to commit a battery with present ability or an attempt to alarm with a dangerous weapon. TEX. PEN. CODE art. 1138 (1961).

55. In reversing a conviction because of an instruction that would have authorized a verdict of guilty even if both parties knew the weapon was unloaded, the Tennessee court said that there must be circumstances "to satisfy a jury that there was an intent, coupled with an ability, to do harm, or that the other party had a right so to believe from the facts before him; otherwise, there is no danger of a breach of the peace." *Richels v. State*, 33 Tenn. (1 Sneed) 606, 609 (1854).

56. For example the Iowa court, in sustaining a conviction of assault with intent to do great bodily injury, said:

[H]ow could defendant have intended to shoot the person assaulted unless the gun which he held in his hands was, in fact, or, as he believed, so loaded as that it could be fired? If he believed that it was loaded and intended to fire it at the person assaulted, he was guilty of an assault with intent to commit great bodily injury, although in fact and contrary to his belief it was not loaded.

State v. Mitchell, 139 Iowa 455, 459, 116 N.W. 808, 810 (1908).

57. Only Illinois and Louisiana have written the tort theory into their statutes. ILL. REV. STAT. ch. 38, § 12-1 (1961); LA. REV. STAT. § 14:36 (1950).

sault by a statutory requirement of "present ability,"⁵⁸ only a few jurisdictions have achieved the same result by judicial interpretation.⁵⁹ Moreover, references to "such circumstances as denote at the time an intention, coupled with the present ability"⁶⁰ do not necessarily refer to actual present ability. Where criminal assault has been enlarged by the addition of the tort theory, this reference is to such circumstances as are sufficient to create a reasonable apprehension of receiving an immediate battery on the part of the other person.⁶¹

III. ATTEMPT TO ASSAULT

From what has been said, it is apparent that reference may be made to an "attempt to assault" without logical absurdity. There is nothing absurd in referring to an attempt to frighten, which would constitute, if successful, a criminal assault in most jurisdictions. Where an attempt to commit a battery with present ability is the only basis on which a criminal assault may be established, an "attempt to assault" would mean in substance an attempt to commit a battery without present ability. Even where a criminal assault still has its original meaning as an attempt to commit a battery, reference to an attempt to assault is not necessarily absurd. Because of the recognized difference between the requirement of proximity for an assault and for a general criminal attempt, an attempt to assault would indicate an effort to accomplish a battery that had proceeded beyond the stage of preparation, but had not

58. ARIZ. REV. STAT. ANN. § 13-241(A) (1956); ARK. STAT. ANN. § 41-601 (1947); CAL. PEN. CODE § 240; COLO. REV. STAT. ANN. § 40-2-33 (1953); IDAHO CODE ANN. § 18-901 (1947); ILL. REV. STAT. ch. 38, § 55 (1961); IND. ANN. STAT. § 10-402 (1956); ME. REV. STAT. ANN. ch. 130, § 21 (1954); TEX. PEN. CODE art. 1141 (1961); UTAH CODE ANN. § 76-7-1 (1953); WYO. STAT. ANN. § 6-67 (1957). See also MODEL PENAL CODE § 201, app. H (Tent. Draft No. 9, 1959). Under such a statute, it is error to instruct that apparent present ability is sufficient. *Pratt v. State*, 49 Ark. 179, 4 S.W. 785 (1887).

59. *Flournoy v. State*, 270 Ala. 448, 120 So. 2d 124 (1960); *Chapman v. State*, 78 Ala. 463 (1885); *Burton v. State*, 8 Ala. App. 295, 62 So. 394 (1913); *State v. Lasby*, 174 A.2d 323 (Del. Super. Ct. 1961); *State v. Wilson*, 218 Ore. 575, 346 P.2d 115 (1959); *State v. Godfrey*, 17 Ore. 300, 20 Pac. 625 (1889). The Maine court has said that a statute defining assault in the terms "whoever unlawfully attempts to strike, hit, touch . . . having an intention and existing ability . . ." was a codification of common-law assault. *State v. Rand*, 156 Me. 81, 161 A.2d 852 (1960); *State v. Mahoney*, 122 Me. 483, 120 Atl. 543 (1923).

60. *Guarro v. United States*, 237 F.2d 578, 580 (D.C. Cir. 1956).

61. Compare *Huffman v. State*, 200 Tenn. 487, 292 S.W.2d 738 (1956), which includes such a reference, with *State v. Smith*, 21 Tenn. (2 Humph.) 457 (1841), which holds that a criminal assault may be committed with an unloaded gun.

come close enough to completion to constitute an assault. It is not surprising, therefore, that there is a tendency to break away from the ancient view that there is no such offense known to the law as an attempt to commit an assault.

A. DEVELOPMENT OF THE CONCEPT OF AN ATTEMPT TO ASSAULT

One of the earliest steps toward recognition of an attempt to commit an assault was in *O'Connell*,⁶² a New York case. The charge was assault with a deadly weapon, and the prosecution was persuaded to accept a plea of guilty of an attempt to commit the offense. The defendant appealed from the conviction on the ground that the crime of which he had been convicted did not exist. In affirming the conviction, the court pointed out that to be guilty of an assault the defendant would have to be within reach of his intended victim, but he could be guilty of an attempt by arming himself and attempting to reach him.

Almost at the same time the Montana court, in *Herron*,⁶³ took the same position almost by default. The information was for "an attempt to commit an assault with a deadly weapon, with the intent to commit a violent injury." A verdict of acquittal was directed for lack of proof that the weapon was loaded. In holding this to have been erroneous, the court said: "This case is a prosecution for an attempt. The attempt is clear. The intent is expressly declared by defendant himself. The ability is proven, that is, if the gun was loaded."⁶⁴ The court held that the fact the gun was unloaded, if such was the fact, is a matter of defense to be established by the defendant, and that the use of the weapon in this manner gives rise to a presumption that it is loaded. The fact that the information charged an attempt to assault rather than an assault was not discussed. A few years later, the same court said in affirming a directed verdict of not guilty: "We have not been called upon to consider whether this defendant might have been convicted of an attempt to commit an assault or of any other crime."⁶⁵

The Alabama court was confronted with the problem more directly.⁶⁶ In a trial under an indictment charging an assault with

62. *People v. O'Connell*, 60 Hun 109, 14 N.Y. Supp. 485 (Sup. Ct. 1891). Loose statements can be found much earlier, however. For example: "We hold, that if a slave, in the attempt, unjustifiably, to commit an assault, or assault and battery, on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter . . ." *Bob (a Slave) v. State*, 29 Ala. 20, 25 (1856). This statement was made in a murder case in which Bob had unquestionably attempted to commit a battery upon another slave.

63. *State v. Herron*, 12 Mont. 230, 29 Pac. 819 (1892).

64. *Id.* at 234, 29 Pac. at 820.

65. *State v. Barry*, 45 Mont. 598, 604, 124 Pac. 775, 777 (1912).

66. *White v. State*, 107 Ala. 132, 18 So. 226 (1894).

intent to murder, it was shown that D threatened to kill X, and pulled from his pocket a pistol, which was immediately taken from him by a police officer. A request to charge the jury that D was not guilty unless he actually presented the pistol at X was refused, and this refusal was relied upon as error. In affirming the conviction, the appellate court held that the requested instruction was faulty because if the pistol had not been presented, D might have been convicted of an attempt to commit an assault.

Sometime later, in *Burton*,⁶⁷ the Alabama Court of Appeals made what seems to be the most helpful analysis of this type of case. D was indicted for assault with intent to rape, which was a statutory felony. The evidence showed that D accosted a fifteen-year-old girl at a remote spot and, as she fled screaming, ran after her for about a hundred yards, but then abandoned his pursuit without touching her. D was convicted of an "attempt to commit an assault with intent to rape." In affirming the conviction, the appellate court pointed out that: (1) an attempt to rape is a misdemeanor at common law and recognized as an offense under the law of the state; (2) an assault requires a present ability to do the threatened harm, but an attempt to commit rape requires only an apparent ability to do so; (3) if an attempt to rape falls short of an assault, it constitutes the misdemeanor of attempted rape; and (4) the verdict finding D guilty of an "attempt to commit an assault with intent to rape" can only mean that he was found guilty of "an attempt to commit rape."⁶⁸ And much more recently, in affirming a conviction worded in terms of an attempt to commit an assault with intent to rape, the same court repeated, quoting from *Burton*, " 'an attempt to commit an assault with intent to rape' . . . means an attempt to rape which has not proceeded far enough to amount to an assault."⁶⁹ In other words, if trial judges and jurors talk in terms of an attempt to commit an assault with intent to rape, this will be accepted as synonymous with an attempt to rape, which has always been recognized as a crime in Alabama.

The New Hampshire court, in refusing to quash an indictment, emphasized that the charging part of the pleading rather than the name used by the pleading determines the offense of which the defendant is accused.⁷⁰ The charge was that D attempted to make

67. *Burton v. State*, 8 Ala. App. 295, 62 So. 394 (1913).

68. *Id.* at 297, 62 So. at 395.

69. *McQuirter v. State*, 36 Ala. App. 707, 709, 63 So. 2d 388, 390 (1953). See also *Morris v. State*, 32 Ala. App. 278, 25 So. 2d 54 (1946).

70. *State v. Skillings*, 98 N.H. 203, 97 A.2d 202 (1953). For reference to "an attempt to commit the crime of assault and battery," see *Smith v. State*, 79 Okla. Crim. 1, 27, 151 P.2d 74, 87 (1944).

an aggravated assault upon a woman by means of drugs capable of rendering her unconscious and inflicting serious physical injury upon her. D moved to quash the indictment upon the ground, *inter alia*, that since an assault may be no more than an attempt to commit a battery, an attempted assault is no more than an attempted attempt and, therefore, not a crime. In rejecting this contention, the court pointed out that according to the statute an assault or battery "of an aggravated nature" is a felony. Since the prosecution alleged not merely an "attempt to attempt" to commit a battery (an attempted assault), but an attempt to commit a battery of an aggravated nature, the indictment sufficiently alleged the attempt within the meaning of the statute punishing attempts.

The most significant case in point is *Wilson*,⁷¹ which was decided by the Supreme Court of Oregon in 1959. D confronted and threatened his estranged wife in her place of employment, and then procured a shotgun from his car just outside to carry out his threat. He was unable to re-enter, however, because his wife secured herself safely behind locked doors. A prosecution for assault with a dangerous weapon resulted in a conviction of attempt to commit the offense charged. An appeal was taken primarily upon the ground that there is no such offense as that of which D had been convicted. In affirming the judgment of conviction, the Oregon court attempted to dispel forever the notion that there can be no attempt to assault. After discussing the problem *obiter* under a different definition of assault,⁷² the court said, "we are of the opinion that criminal assault, even as defined by this court, should be regarded as a distinct crime rather than as an uncompleted battery."⁷³ This is quite unconvincing in view of the fact that the term, used in the Oregon statute without definition, is defined by the court as an attempt to commit a battery by one having present ability.⁷⁴ There was no intention of relying upon this point alone, as shown by this statement: "Assume that we are forced to deal with an attempt to attempt to commit a battery, is there any reason why we cannot and should not bring such conduct within the law of criminal attempt generally?"⁷⁵ The negative answer included the following:

The mere fact that assault is viewed as preceding a battery should not preclude us from drawing a line on one side of which we require the present ability to inflict corporal injury, denominating this an as-

71. *State v. Wilson*, 218 Ore. 575, 346 P.2d 115 (1959).

72. *Id.* at 582, 346 P.2d at 119.

73. *Id.* at 586, 346 P.2d at 120.

74. *Ibid.*

75. *Id.* at 585, 346 P.2d at 120.

sault, and on the other side conduct which falls short of a present ability, yet so advanced toward the assault that it is more than mere preparation and which we denominate an attempt.⁷⁶

B. BASES OF AN ATTEMPT TO ASSAULT

While the notion of an attempt to assault as a logical absurdity has been dispelled, steps taken to recognize it as a punishable offense have been, and probably should continue to be, very limited in scope. These steps have been based primarily on four theories.

1. *Attempts to Frighten*

One judge has taken the position that "fright is such bodily harm that to shoot in the general direction of a person, with intent to 'bluff or scare' him, is an assault."⁷⁷ If this were true, then an unlawful attempt to place another in apprehension of receiving an immediate battery would, if successful, be an accomplished battery. But, while the unlawful creation of such apprehension is recognized as a criminal assault in most jurisdictions, no case has been found in which it has been held to constitute a battery.

Wilson contains an elaborate dictum to the effect that an attempt to frighten would constitute the offense of attempt to assault in any jurisdiction where criminal assault may be established on the tort theory.⁷⁸ In Rhode Island, which is such a jurisdiction, the judge incorporated this idea in his instructions to the jury in a case in which the defendant unquestionably placed another in apprehension.⁷⁹ But this point was not raised on appeal because defense counsel admitted that an assault had been committed, claiming only that it was not an assault with a dangerous weapon.

Shooting in the direction of another, even without an attempt to hit him, is such a reckless and dangerous act that it should be made punishable even if it results neither in hitting anyone nor in placing anyone in apprehension of being hit. It would seem wiser, however, to take this step by legislation, such as that providing a penalty for improper use of weapons⁸⁰ or for endangering

76. *Id.* at 588, 346 P.2d at 121. The court added: "The contrary view is little more than a barren logical construction." *Id.* at 590, 346 P.2d at 122.

77. *Edwards v. State*, 4 Ga. App. 167, 171, 60 S.E. 1033, 1035 (1908) (Powell, J., concurring). When the case, which had been reversed for other reasons, came up again, Powell wrote the opinion and included the same statement. *Edwards v. State*, 4 Ga. App. 849, 850, 62 S.E. 565 (1908). He used somewhat similar language in a later case. *Smallwood v. State*, 9 Ga. App. 300, 70 S.E. 1124 (1911).

78. *State v. Wilson*, 218 Ore. 575, 582, 346 P.2d 115, 119 (1959).

79. *State v. Baker*, 20 R.I. 275, 38 Atl. 653 (1897).

80. CAL. PEN. CODE § 417.

another by reckless conduct,⁸¹ than by broadening the scope of criminal assault. Criminal assault so broadly conceived would include any number of futile attempts to frighten or startle that are too insignificant to be added to the category of crime.

2. *Lack of Present Ability*

Wilson held that an effort to commit a battery that goes beyond preparation but lacks the element of "present ability" is punishable as an attempt to assault. Because the statute in *Wilson* imposed a penalty without a definition of assault, the court was not confronted with a problem that would be involved in a state where criminal assault is defined by statute as an attempt to commit a battery by one having present ability. Under the doctrine of manifested legislative intent, an omission from a penal provision evinces a legislative purpose not to punish the omitted act.⁸² Therefore, if a statute defines criminal assault as an attempt to commit a battery by one having present ability and no offense known as an attempt to assault was recognized at the time the statute was adopted, then there would be a clear manifestation of legislative intent under this doctrine that an attempt to commit a battery without present ability should go unpunished. It would be wise to amend the statute by eliminating the requirement of present ability, but this should be done by the legislative body and not by "judicial amendment."

3. *Lack of Proximity*

In *O'Connell* the New York court took the position that an effort to commit a battery that goes beyond preparation, but does not come close enough to completion to constitute an assault, is punishable as an attempt to commit an assault. If such misconduct is to be punished, it would seem more logical to charge an attempt to commit a battery rather than an attempt to commit an assault. In other words, two grades or degrees of attempt to commit a battery should be recognized—one coming very close to the intended victim and denominated an "assault," the other more remote and known only as an "attempt to commit a battery."

81. ILL. REV. STAT. ch. 38, § 12-5 (1961).

82. For example, if a statutory offense involves a transaction between two persons and provides a penalty for only one of them, the other may not be convicted as a conspirator, an inciter, or an abettor, since the omission evinces a legislative purpose to leave his participation unpunished. *Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Farrar*, 281 U.S. 624 (1930); *Wilson v. State*, 130 Ark. 204, 196 S.W. 921 (1917); *State v. Teahan*, 50 Conn. 92 (1882); *People v. Levy*, 283 App. Div. 383, 128 N.Y.S.2d 275 (1954).

4. *Aggravated Assault*

Burton emphasized that an attempt to commit an assault with intent to rape is not the name of a crime, but is merely a description of the offense of attempted rape. The same is true of other "assaults with intent," such as assault with intent to murder or to rob. As an attempt to commit the designated felony is a lesser included offense, the conviction should be for the attempt where it, but not the assault, is established by the evidence.

Some aggravated assaults, such as assault with a dangerous weapon, include no lesser offense other than simple assault. In *Wilson* the court took the position that an assault, although defined as an attempt to commit a battery, was a separate substantive offense rather than an uncommitted battery. The court would have been much more convincing if, instead of speaking of simple assault, it had declared that since the statutory crime of assault with a dangerous weapon was unknown to the common law, it was a separate substantive offense and not an uncommitted battery. This would not have been entirely novel since it was intimated about a century ago by Bishop⁸³ and more recently by Thurman Arnold.⁸⁴

IV. BATTERY INCLUDES ASSAULT

A problem related to attempt to assault arises out of the age-old assertion that every battery includes an assault.⁸⁵ This was a logical conclusion when a criminal assault was simply an attempt to commit a battery and a battery was assumed to be a personal harm perpetrated intentionally. A right to recover damages for negligent injury was recognized in the early days, but under common-law pleading the action was not trespass for battery but trespass on the case;⁸⁶ hence, the word "battery" was not used in tort law unless the harm was intentional. It has long been recognized, however, that a criminal battery may be unintentional, as where

83. "It would seem, therefore, not possible [that] there should be an indictable attempt to commit a simple assault. Yet perhaps there may be such to commit an aggravated or compound assault . . ." 2 BISHOP, *NEW CRIMINAL LAW* § 62 (8th ed. 1892).

84. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 65 (1930).

85. See note 8 *supra*. See also *State v. Mills*, 19 Del. (3 Penne.) 508, 52 Atl. 266 (1902); *State v. Grayson*, 50 N.M. 147, 172 P.2d 1019 (1946); *State v. Green*, 84 Ohio App. 298, 82 N.E.2d 105 (1948); *Wood v. Commonwealth*, 149 Va. 401, 140 S.E. 114 (1927).

86. *RESTATEMENT, TORTS*, Explanatory Notes §§ 13–17, at 27 (1934).

personal injury results from criminal negligence⁸⁷ or from the perpetration of an unlawful act *malum in se*.⁸⁸

This seems to suggest that a battery could be committed without an assault. This conclusion would be inescapable except for the well-known fact that terms used in criminal definitions are not always limited to their literal meanings. Suppose, for example, that X steals a pearl necklace and offers to sell it to D for only a fraction of its true value, telling D that he inherited it, but needs to raise money quickly; D, however, is convinced that X stole the necklace although he has no actual knowledge of how it was acquired. If D hands over the money and takes the necklace, he will be guilty of receiving stolen property.⁸⁹ Although the definition of this crime is in terms of a "person who buys or receives property which has been stolen . . . knowing the same to be so stolen,"⁹⁰ the word "knowing" means "knowing or believing."⁹¹ In like manner, when the phrase "attempt to commit a battery" is employed in the definition of criminal assault, the legal signification is an "attempt to commit a battery or an actual battery."⁹² Even where the *statute* defines assault as an attempt to commit a battery, courts say that "a battery cannot be committed without assaulting the victim"⁹³ or that "when the assault culminates in a battery the offense is assault and battery . . ."⁹⁴

Such expressions as "a blow inflicted in the former manner

87. *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927); *Tift v. State*, 17 Ga. App. 663, 88 S.E. 41 (1916); *Banovitch v. Commonwealth*, 196 Va. 210, 83 S.E.2d 369 (1954). For a scholarly discussion of battery based upon criminal negligence, see Hall, *Assault and Battery by the Reckless Motorist*, 31 J. CRIM. L. & C. 133 (1940).

88. *McGee v. State*, 4 Ala. 54, 58 So. 1008 (1912); *King v. State*, 157 Tenn. 635, 11 S.W.2d 904 (1928).

89. *Lewis v. State*, 81 Okla. Crim. 168, 172, 162 P.2d 201, 203 (1945); *Reaves v. Commonwealth*, 192 Va. 443, 451, 65 S.E.2d 559, 564 (1951).

90. CAL. PEN. CODE § 496.

91. *Meath v. State*, 174 Wis. 80, 83, 182 N.W. 334, 335 (1921).

92. "Liability for *assault* has been imposed for reckless conduct causing injury, although ordinarily an assault (as distinguished from a battery) requires an intent to injure, or at least to alarm. But these cases involve no more than interpreting the term 'assault' to include also a battery . . ." Hall, *supra* note 87, at 157. This has been spelled out in the MODEL PENAL CODE § 211.1 (Proposed Official Draft 1962):

(1) *Simple Assault*. A person is guilty of an assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon . . .

93. *People v. McCaffrey*, 118 Cal. App. 2d 611, 618, 258 P.2d 557, 562 (Dist. Ct. App. 1953).

94. *Hall v. State*, 309 P.2d 1096, 1097 (Okla. Crim. App. 1957) (syllabus by the court).

would constitute an assault"⁹⁵ and "the assault alleged was a deliberate touching" of an unlawful nature⁹⁶ clearly indicate that actual battery is included within the definition of criminal assault since the courts are thinking of "assault" in terms of actual contact. Also significant is the tendency to prosecute for "assault" although a battery has clearly been committed.⁹⁷ Even more convincing are the assault cases in which there was no actual attempt to commit a battery. Thus the crime of "assault and battery" has been committed if personal injury to another has resulted unintentionally, but through criminal negligence,⁹⁸ or where an injury has resulted unintentionally from an act *malum in se*.⁹⁹ In such prosecutions, it is not necessary for the accusatory pleading even to mention the word "battery" because proof of the battery will support a conviction of simple assault¹⁰⁰ or, if the facts war-

95. *State v. Schutte*, 87 N.J.L. 15, 18, 93 Atl. 112, 114 (Sup. Ct. 1915).

96. *Guarro v. United States*, 237 F.2d 578, 579 (D.C. Cir. 1956).

97. See, e.g., *Medlin v. United States*, 207 F.2d 33 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 905 (1954) (kicking another with shoes constitutes assault with a deadly weapon); *Smith v. State*, 105 Ala. 136, 17 So. 107 (1895) (seizing and holding another); *Bonner v. State*, 97 Ala. 47, 12 So. 408 (1893) (rolling a bale of cotton onto another); *State v. Lankford*, 29 Del. (6 Boyce) 594, 102 Atl. 63 (1917) (communication of a disease); *Dyson v. United States*, 97 A.2d 135 (D.C. Mun. App. 1953) (unlawful touching); *Allen v. People*, 82 Ill. 610 (1876) (striking another over the head with a pistol); *Carr v. State*, 135 Ind. 1, 34 N.E. 533 (1893) (administration of poison); *Rakes v. State*, 227 Md. 172, 175 A.2d 579 (1961) (severe beating of a police officer); *Commonwealth v. Cooley*, 72 Mass. (6 Gray) 350 (1856) (excessive force in quelling an apparent fight); *State v. Kinney*, 34 Minn. 311, 25 N.W. 705 (1885) (putting a trespasser off a train in motion); *State v. Kunkel*, 244 S.W. 968 (Mo. Ct. App. 1922) (hugging and kissing a woman against her will); *State v. Norman*, 237 N.C. 205, 74 S.E.2d 602 (1953) (choking); *State v. Hedrick*, 95 N.C. 624 (1886) (tripping another and causing him to fall); *Hand v. State*, 88 Tex. Crim. 422, 227 S.W. 194 (1921) (indecent familiarity with a woman); *Skidmore v. State*, 2 Tex. Crim. 20 (1877) (beating of a prisoner by a policeman).

98. This arises most frequently from criminal negligence in the operation of an automobile. *Wellons v. State*, 77 Ga. App. 652, 48 S.E.2d 922 (1948); *Tift v. State*, 17 Ga. App. 663, 88 S.E. 41 (1916); *Woodward v. State*, 164 Miss. 468, 144 So. 895 (1932); *State v. Schutte*, 87 N.J.L. 15, 93 Atl. 112 (Sup. Ct. 1915); *State v. Suddreth*, 184 N.C. 753, 114 S.E. 828 (1922). See also *Fish v. Michigan*, 62 F.2d 659 (6th Cir. 1933); *Medley v. State*, 156 Ala. 78, 47 So. 218 (1909) (criminal negligence in firing a gun); *Hill v. State*, 63 Ga. 578 (1879) (criminal negligence in throwing a stone).

99. See *Commonwealth v. Smith*, 312 Mass. 557, 45 N.E.2d 742 (1942) (an attempted suicide); *Commonwealth v. Mann*, 116 Mass. 58 (1874); *State v. Lehman*, 131 Minn. 427, 430, 155 N.W. 399, 400 (1915) (a shot fired with intent only to frighten another).

100. *Commonwealth v. Hawkins*, 157 Mass. 551, 32 N.E. 862 (1893); *State v. Lehman*, 131 Minn. 427, 155 N.W. 399 (1915); *State v. Browsers*, 356 Mo. 1195, 205 S.W.2d 721 (1947); *State v. McLean*, 234 N.C. 283,

rant, of aggravated assault.¹⁰¹ Many penal codes make no special provision for aggravated battery; it is unnecessary because battery includes assault, and the statutes providing penalties for aggravated assaults will cover such misdeeds.¹⁰² Thus it was not error to instruct in terms of "aggravated assault and battery"¹⁰³ in a trial for aggravated assault in which a battery was clearly established. The fact that a conviction of aggravated assault is warranted by proof of a corresponding aggravated battery has been so obvious as to induce courts to emphasize the lack of any requirement of actual injury or contact.¹⁰⁴

Some courts have rationalized these cases in terms of a fiction—the law will presume an intent to injure from an injury caused by criminal negligence.¹⁰⁵ Others have spoken more frankly: "[A]ssault may be . . . done simply by operating the vehicle in such a reckless, heedless, and criminally negligent manner as to run him down without having any specific intent so to do."¹⁰⁶ As explained by one writer after exhaustive research, "there can be no

67 S.E.2d 75 (1951). See also *Rex v. Chapin*, 22 Cox Crim. Cas. 10 (Cent. Crim. Ct. 1909), where in an effort to make voting papers illegible, a woman broke a bottle of some chemical over a ballot box and unintentionally splashed some of it on another's face with harmful results; this was held to constitute a common assault.

101. *People v. Henderson*, 34 Cal. 2d 340, 209 P.2d 785 (1949); *People v. Weaver*, 71 Cal. App. 2d 685, 163 P.2d 456 (Dist. Ct. App. 1945); *Bailey v. State*, 101 Ga. App. 81, 113 S.E.2d 172 (1960); *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939); *People v. Benson*, 321 Ill. 605, 152 N.E. 514 (1926); *Lane v. State*, 65 Okla. Crim. 192, 84 P.2d 807 (1938); *State v. Cancelmo*, 86 Ore. 379, 168 Pac. 721 (1917).

102. This has been spelled out in the MODEL PENAL CODE § 211.1 (Proposed Official Draft 1962):

(2) *Aggravated Assault*. A person is guilty of aggravated assault if he:

(a) Attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

103. *Gaston v. State*, 11 Tex. Crim. 143 (1881).

104. *People v. Rader*, 24 Cal. App. 477, 141 Pac. 958 (Dist. Ct. App. 1914); *Lindsey v. State*, 67 Fla. 111, 64 So. 501 (1914).

105. "The law has regard for personal safety and human life and if one with reckless indifference to results injures another it holds him to have intended the consequences of his act and treats him as if he had done an intentional wrong." *Fish v. Michigan*, 62 F.2d 659, 661 (6th Cir. 1933). *Accord*, *Luther v. State*, 177 Ind. 619, 98 N.E. 640 (1912); *State v. Schutte*, 87 N.J.L. 15, 19, 93 Atl. 112, 114 (Sup. Ct. 1915). See also *State v. Lankford*, 29 Del. (6 Boyce) 594, 102 Atl. 63 (1917). Compare *State v. Richardson*, 179 Iowa 770, 785, 162 N.W. 28, 33 (1917), in which a conviction of assault with intent to inflict great bodily injury, based upon criminal negligence was reversed, but the court said: "This does not exclude a conviction for assault and battery, or assault."

106. *Bailey v. State*, 101 Ga. App. 81, 84, 113 S.E.2d 172, 174 (1960).

assault without physical injury, unless there was an intention to inflict harm or at least to cause apprehension,"¹⁰⁷ but no such intent is required for injurious assault. In the words of Mr. Justice Traynor, speaking for the California Supreme Court in regard to battery, "the assault, to adopt the statutory language, is 'necessarily included therein.'"¹⁰⁸

CONCLUSION

Originally, "assault" as a criminal offense meant an attempt to commit a battery, while "assault" as a tort meant an intentional act wrongfully placing another in apprehension of receiving an immediate battery. The original concept of criminal assault has been changed by the incorporation of the tort concept and by the addition of a requirement of present ability. After these changes, it is more meaningful to speak of an attempt to assault as a criminal offense. An attempt to assault has been based on: (1) an attempt to frighten; (2) an attempt to commit a battery without present ability; (3) an effort to commit a battery that has gone beyond the stage of mere preparation, but has not come close enough to completion to constitute an assault; and (4) an attempt to commit an aggravated assault such as assault with intent to murder or to rob. These are the only bases, however, upon which attempts to assault should be made punishable offenses. Also, because terms used in criminal definitions are not always limited to their literal meanings, courts sometimes have interpreted "assault", which is an intentional act, to include both an assault and a battery, even though the battery may be an unintentional act, such as an act of criminal negligence. This process has given rise to the age-old assertion that "every battery includes an assault."

107. Hall, *supra* note 87, at 137. An assault has not been committed (without actual contact) when there was neither an intent to commit a battery nor an intent to put the other in fear. *State v. Storm*, 124 Mont. 102, 220 P.2d 674 (1950); *accord*, *Thomas v. State*, 99 Ga. 38, 26 S.E. 748 (1896); *State v. Chiavello*, 69 N.J. Super. 479, 174 A.2d 506 (App. Div. 1961).

108. *People v. Greer*, 30 Cal. 2d 589, 597, 184 P.2d 512, 517 (1947), quoted with approval in *Gomez v. Superior Court*, 50 Cal. 2d 640, 648, 328 P.2d 976, 981 (1958). The statute referred to is CAL. PEN. CODE § 1023, which provides that "conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged . . . or for an offense necessarily included therein"

